# Meor Atiqulrahman bin Ishak (an infant, by his guardian ad litem, Syed Ahmad Johari bin Syed Mohd) & Ors v Fatimah bte Sihi & Ors

FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION NO 01–3 OF 2005(N)
ABDUL MALEK AHMAD PCA, STEVE SHIM CJ (SABAH & SARAWAK) AND ABDUL HAMID MOHAMAD FCJ
12 JULY 2006

*Constitutional Law — Fundamental liberties — Freedom of religion — Prohibition against wearing of turban by male students in schools — Whether regulations prohibiting wearing of turban by school pupils during school hours violated art 11(1) of the Federal Constitution — Whether right to wear a turban was integral part of the religion of Islam — Test to be applied*

The three appellants were primary school students at Sekolah Kebangsaan Serting Hilir (FELDA), Bandar Baru Serting, Negeri Sembilan. The school had issued the Peraturan Sekolah Kebangsaan Serting (FELDA) 1997 ('the School Regulations 1997'), made pursuant to Surat Pekeliling Ikhtisas Bil. 9/1975 issued by the Ministry of Education. Regulation 3 of the School Regulations 1997 stipulated the uniform for male pupils. Regulation 3(i)(i) specifically prohibited all pupils from wearing 'jubah, turban (serban), topi, ketayap dan purdah'. The appellants wore turban as part of the school uniform to school. They were advised repeatedly not to do so and to comply with the School Regulations 1997 but they refused. As a result, on 3 November 1997, the appellants were expelled from the school with effect from 10 November 1997. The appellants challenged their dismissal in court. The learned judge found in their favour, inter alia, ruling that the School Regulations 1997 was unconstitutional (see [2000] 5 MLJ 375). The Court of Appeal reversed the judgment of the High Court (see [2005] 2 MLJ 25). The Court of Appeal, in arriving at its conclusion, applied the test of whether 'the right to wear a 'serban' is an integral part of the religion of Islam'. The court concluded that there was not a shred of evidence before the learned judge confirming that the wearing of a serban is mandatory in Islam and is therefore an integral part of Islam. This court granted leave to appeal on one issue only: Whether the regulations prohibiting the wearing of 'serban' by school pupils during school hours violated art 11(1) of the Federal Constitution.

**Held**, dismissing the appeal:

(1) Whether a practice is or is not an integral part of a religion is not the only factor that should be considered. Other factors are equally important in considering whether a particular law or regulation is constitutional or not under art 11(1) of the Federal Constitution. First, there must be a religion.

Secondly, there must be a practice. Thirdly, the practice is a practice of that religion. All these having been proved, the court should then consider the importance of the practice in relation to the religion. This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or 'an integral part' of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it (see para 17).

(2) Even if the court were to accept the view of SP3 that wearing a turban (by adult Muslim males) is 'sunat' or (commendable), it certainly does not rank on the same level as 'sunat prayers' (see para 38). So, the 'practice' is of little significance from the point of view of the religion of Islam, what more, in relation to under-aged boys. Certainly, it is not a part of 'Islamic prophetic teaching' as submitted by the learned counsel for the appellants (see para 39).

(3) The School Regulations 1997 in so far as it prohibited the students from wearing turban as part of the school uniform during school hours did not contravene the provision of art 11(1) of the Federal Constitution and therefore was not unconstitutional (see para 47).

**[Bahasa Malaysia summary**

Ketiga-tiga perayu merupakan pelajar sekolah rendah di Sekolah Kebangsaan Serting Hilir (FELDA), Bandar Baru Serting, Negeri Sembilan. Sekolah itu telah mengeluarkan Peraturan Sekolah Kebangsaan Serting (FELDA) 1997 ('Peraturan Sekolah 1997'), yang dibuat menurut Surat Pekeliling Ikhtisas Bil. 9/1975 yang dikeluarkan oleh Kementerian Pelajaran. Peraturan 3 kepada Peraturan Sekolah 1997 menetapkan pakaian seragam untuk pelajar lelaki. Peraturan 3(i)(i) dengan khususnya melarang semua pelajar daripada memakai 'jubah,serban, topi, ketayap dan purdah'. Perayu-perayu memakai serban sebagai sebahagian daripada pakaian seragam ke sekolah. Mereka dinasihatkan berulang kali untuk tidak berbuat begitu dan untuk mematuhi Peraturan Sekolah 1997 tetapi mereka enggan berbuat sedemikian. Akibatnya, pada 3 November 1997, perayu-perayu telah dibuang sekolah mulai 10 November 1997. Perayu-perayu mencabar pemberhentian mereka di mahkamah. Hakim yang bijaksana membuat keputusan menyebelahi mereka, antara lain, memutuskan bahawa Peraturan Sekolah 1997 tidak berperlembagaan (lihat [2000] 5 MLJ 375). Mahkamah Rayuan telah mengakas penghakiman Mahkamah Tinggi (lihat [2005] 2 MLJ 25). Mahkamah Rayuan, dalam mencapai keputusan, telah menggunakan ujian sama ada 'the right to wear a 'serban' is an integral part of the religion of Islam'. Mahkamah tersebut memutuskan bahawa tiada keterangan di hadapan hakim yang bijaksana yang mengesahkan bahawa pemakaian serban adalah mandatori dalam Islam dan adalah saling melengkapkan dalam Islam. Mahkamah ini memberikan kebenaran untuk merayu atas satu persoalan sahaja. Sama ada peraturan tersebut melarang serban oleh pelajar sekolah semasa waktu sekolah bertentangan dengan perkara 11(1) Perlembagaan Persekutuan.

**Diputuskan**, menolak rayuan tersebut:

(1) Sama ada amalan adalah atau bukan sebahagian yang melengkapkan suatu agama itu bukanlah satu-satunya faktor yang patut dipertimbangkan. Faktor-faktor lain sama pentingnya dalam mempertimbangkan sama ada suatu undang-undang atau peraturan tertentu adalah berperlembagaan atau tidak di bawah perkara 11(1) Perlembagaan Persekutuan. Pertama, perlu ada agama. Kedua, perlu ada amalan. Ketiga, amalan itu adalah amalan agama. Setelah kesemuanya dibuktikan, mahkamah hendaklah kemudian mengambilkira kepentingan amalan itu dalam agama. Di sini persoalan sama ada amalan itu melengkapkan agama atau tidak bukanlah relevan. Jika amalan itu suatu yang wajib atau 'an integral part' dalam agama, mahkamah patut menitikberatkannya. Jika tidak, mahkamah, akan sekali lagi bergantung kepada tahap kepentingannya, memberinya kurang perhatian (lihat perenggan 17).

(2) Jikapun mahkamah menerima pendapat SP3 bahawa memakai serban (oleh lelaki dewasa Muslim) adalah 'sunat' atau (usaha yang patut dipuji), ia tidak meletakkannya pada tahap sama seperti solat sunat (lihat perenggan 38). Oleh itu, 'practice' itu tidak penting dari pandangan agama Islam, apa lagi, berkaitan budak lelaki bawah umur. Semestinya, ia bukan sebahagian daripada 'Islamic prophetic teaching' seperti yang dihujahkan oleh peguam yang bijaksana bagi pihak perayu-perayu (lihat perenggan 39).

(3) Peraturan Sekolah 1997 setakat menghalang pelajar-pelajar daripada memakai serban sebagai sebahagian daripada seragam sekolah semasa waktu sekolah tidak bercanggah dengan peruntukan perkara 11(1) Perlembagaan Persekutuan dan oleh itu tidak berperlembagaan (lihat perenggan 47).]

**Notes**

For cases on freedom of religion, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1790–1800.

**Cases referred to**

*Commissioner, The, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar* AIR 1954 SC 282 (refd)

*Commissioner of Police v Acharya Jagadishwaranada Avadhuta* (2004) 2 LRI 39 (refd)

*Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1 (refd)

*Hajjah Halimatussadiah bte Hj Kamaruddin v Public Services Commission Malaysia & Anor* [1994] 3 MLJ 61 (refd)

*Javed v State of Haryana* AIR 2003 SC 3057 (refd)

*Sardar Syedna Taher Saifuddin Saheb v State of Bombay* AIR 1962 SC 853 (refd)

**Legislation referred to**

Federal Constitution art 11(1), (5)

*Mohamed Hanipa bin Maidin (Muhammad Firdaus bin Zakaria, Mohd Fadzli bin Mohd Ramly and Abdullah bin Abdul Karim with him) (Mohamed Hanipa & Associates) for the appellant.*

*Dato' Umi Kalthum bte Abdul Majid (Azizah bte Haji Nawawi with her) (Senior Federal Counsel, Attorney General's Chambers) for the respondent.*

**Abdul Hamid Mohamad FCJ (delivering judgment of the court):**

**[1]** Syed Ahmad Johari bin Syed Mohd ('Syed Ahmad') is the father of the second and third appellants and the guardian of the first appellant. He and his family live in a FELDA Scheme in Serting, Bahau, Negeri Sembilan. He himself is a teacher at Sekolah Menengah FELDA Lui Barat in the same area. The three Appellants were students at Sekolah Kebangsaan Serting Hilir (FELDA), Bandar Baru Serting, Negeri Sembilan. At the material time, the first, second, and third Appellants were in Standard 5, 3 and 2 respectively and about 11, 9 and 8 years old respectively.

**[2]** The school had issued the Peraturan Sekolah Kebangsaan Serting (FELDA) 1997 ('The School Regulations 1997'), made pursuant to Surat Pekeliling Ikhtisas Bil. 9/1975 issued by the Ministry of Education.

**[3]** Regulation 3 of the School Regulations 1997 stipulates, inter alia, that the uniform for male pupils comprises of blue black long pants, white short-sleeved shirt, white rubber shoes and socks. Regulation 3(f)(v) provides that black or blue black songkok is allowed to be worn. However, in regulation 3(i)(i), all pupils are prohibited from wearing 'jubah, turban (serban), topi, ketayap dan purdah'.

**[4]** The appellants wore turban as part of the school uniform to school. They were advised not to do so and to comply with the School Regulations 1997. When they refused, the first respondent requested Syed Ahmad to see her. At a meeting on 3 April 1997, the first respondent requested Syed Ahmad to cooperate to ensure that the appellants adhere to the School Regulations 1997. He refused to cooperate and the appellants continued to wear turban to school.

**[5]** On 28 July 1997 and 4 August 1997, the respondent sent two letters to Syed Ahmad informing him about the appellants' breach of the School Regulations 1997 and for the appellants to substitute 'songkok' for the turban. The first respondent again requested for Syed Ahmad's cooperation to avoid disciplinary action being taken against the appellants.

**[6]** On 30 August 1997, the Director of Education of Negeri Sembilan wrote to Syed Ahmad stressing that the appellants had to observe the Regulations 'demi kepentingan dan kesejahteraan warga sekolah dan masyarakat sekitar'.

**[7]** As the appellants continued to refuse to comply with the Regulations, on 3 November 1997, the first respondent sent a letter to Syed Ahmad informing him that the appellants had been expelled from the school with effect from 10 November 1997.

**[8]** They challenged their dismissal in court. The learned judge found in their favour, inter alia, ruling that the School Regulations 1997 was unconstitutional ([2000] 5 MLJ 375). The Court of Appeal reversed the judgment of the High Court ([2005] 2 MLJ 25).

**[9]** This court granted leave to appeal on one issue only:

> Whether the regulations prohibiting the wearing of 'serban' by school pupils violate art 11(1) of the Federal Constitution.

**[10]** So, the issue before this court is not whether the wearing of turban is constitutional or not but whether the School Regulations 1997, in so far as it prohibits the wearing of turban by the students of the school as part of the school uniform during school hours is constitutional or not.

**[11]** Before us, learned counsel for the appellants argued that the regulation prohibiting students from wearing turban violates the provisions of art 11(1) of the Federal Constitution. That article provides:

> 11(1) Every person has the right to profess and practise his religion and, subject to clause (4), to propagate it.

**[12]** He argued that this appeal relates to the right to practise one's religion but submitted that the word 'profess' and 'practise' must be read together (I do not quite understand what he meant by 'must be read together'.) He submitted that the right to practise one's religion includes every religious practice 'which have some basis or become part of that religion whether they are mandatory or otherwise.' That right can only be restricted if, by exercising such rights, it affects public order, public health and public morality enshrined in art 11(5) of the Federal Constitution. Learned counsel further submitted that the right to wear turban, even though not mandatory, is part of 'Islamic prophetic teaching'.

**[13]** The Court of Appeal, in arriving at its conclusion, applied the test of whether 'the right to wear a 'serban' is an integral part of the religion of Islam'. The court said that that is a question of evidence and it was for the Appellants to adduce sufficient relevant admissible material to prove that that is indeed the case. The court concluded:

> there was not a shred of evidence before the learned judge confirming that the wearing of a serban is mandatory in Islam and is therefore an integral part of Islam.

**[14]** The Court of Appeal in applying 'the integral part of the religion' test relied on a number of Indian authorities like *The Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar* AIR 1954 SC 282, *Sardar Syedna Taher Saifuddin Saheb v State of Bombay* AIR 1962 SC 853, *Javed v State of Haryana* AIR 2003 SC 3057 and *Commissioner of Police v Acharya Jagadishwaranada Avadhuta* (2004) 2 LRI 39. The court also referred to the judgment of the Malaysian

Supreme Court in *Hajjah Halimatussadiah bte Hj Kamaruddin v Public Services Commission Malaysia & Anor* [1994] 3 MLJ 61 where the Supreme Court applied the same test. A

**[15]** Before us, the test was strongly criticised. Learned counsel for the appellants argued that by giving such an interpretation the court was 'rewriting art 11(1) or putting a new or an extra/additional restrictions on the right to profess and practice one's religion apart from the existing restrictions contained/enshrined in art 11(5) of the Federal Constitution.' The Court of Appeal was criticised for relying on Indian authorities, especially because of the differences between the provisions of the Indian Constitution and the Federal Constitution, in particular, the preamble to the Indian Constitution declares India to be a secular state and no religion of the state is provided. It is also said, who is to decide whether a particular practice is an integral part of a religion or not? B C

**[16]** I must stress here that, we are only concerned with the words 'practise his religion'. There is no doubt that the 'integral part of the religion' approach has its merits. Otherwise, in a country with many religions being practised, to allow a regulation or law to be declared unconstitutional just because someone claims that it prohibits his 'religious practice' no matter how trivial it is and even though in a very limited way, would lead to chaos. However, in my view, that test has its demerits too, because it would lead to the following results: so long as a practice is an integral part of a religion, any restriction or limitation, even regulatory, would be unconstitutional. On the other hand, if the practice is not an integral part of a religion, it can even be prohibited completely. The circumstances under which the law or regulation is made may be such that it is justifiable to restrict or regulate it during a period and at the place when and where it is to operate. A constitution is expected to be in force so long as the country exists but circumstances may change dramatically from time to time, even from place to place. On the other hand, a practice may not be an integral part of the teaching of a religion, in the Islamic sense, it may be a 'sunat' e.g. performing the 'sunat' prayers. Using this test, it can be prohibited absolutely and forever. I do not think that is right. D E F G

**[17]** I am therefore of the view that whether a practice is or is not an integral part of a religion is not the only factor that should be considered. Other factors are equally important in considering whether a particular law or regulation is constitutional or not under art 11(1) of the Federal Constitution. I would therefore prefer the following approach. First, there must be a religion. Secondly, there must be a practice. Thirdly, the practice is a practice of that religion. All these having been proved, the court should then consider the importance of the practice in relation to the religion. This is where the question whether the practice is an integral part of the religion or not becomes relevant. If the practice is of a compulsory nature or 'an integral part' of the religion, the court should give more weight to it. If it is not, the court, again depending on the degree of its importance, may give a lesser weight to it. H I

**[18]** In the Islamic context, the classification made by jurists on the 'hukum' regarding a particular practice will be of assistance. Prohibition of a practice which

is 'wajib' (mandatory) should definitely be viewed more seriously than the prohibition of what is 'sunat' (commendable).

**[19]** The next step is to look at the extent or seriousness of the prohibition. A total prohibition certainly should be viewed more seriously than a partial or temporary prohibition. For example, a regulation that prohibits an adult Muslim male from leaving his job to perform the Friday prayer is more serious than a regulation that requires adult male Muslims employees to take turn to perform their 'Asar' prayer, all within the 'Asar' period.

**[20]** Then, we will have to look at the circumstances under which the prohibition is made. An air traffic controller will have to be at his post even during Friday prayers, where replacement by a non-Muslim or a female employee is not possible. A surgeon who starts an emergency operation just before the 'Maghrib' prayer may have to miss his prayer. (Even the Shariah provides exceptions and relaxation of its application under certain circumstances).

**[21]** In other words, in my view, all these factors should be considered in determining whether the 'limitation' or 'prohibition' of a practice of a religion is constitutional or unconstitutional under art 11(1) of the Federal Constitution.

**[22]** Who is to decide? Of course, it has to be the court when the matter comes before the court. Expert witnesses may be called to assist the court regarding a practise or, in the case of Islam, the issue regarding the 'hukum' of the practice may be referred to the Shari'ah Committees (Fatwa Committees) in the States or the National Fatwa Council. Such a reference had been made by the Supreme Court in *Dalip Kaur v Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1992] 1 MLJ 1.

**[23]** In this case, that Islam is a religion is a fact that cannot be denied.

**[24]** The next question is whether the wearing of turban by boys of the age of the appellants is a practice of the religion of Islam. Islam is not about turban and beard. The pagan Arabs, including Abu Jahl, wore turbans and kept beards. It was quite natural for the Prophet (PBUH), born into the community and grew up in it, to do the same. As it was not repugnant to the teaching of Islam, he continued to do so. During the argument, in answer to my question, learned counsel tried to equate the wearing of turban with the 'Hajj': the 'Hajj' too was performed in pre-Islamic days and continued to be performed after the coming of Islam. That, with respect, is misconceived. The 'Hajj' performed by the pagan Arabs was completely different from the 'Hajj' taught by the Prophet (PBUH). Further more, there are clear provisions in the Al-Quran that make the performance of the 'Hajj' mandatory and one of the pillars of Islam.

**[25]** Turbans were (and are) not only worn by Arabs. Other peoples, living in the desert or semi-desert areas, eg the Afghans and Persians wore/wear them too. Indeed, anybody who goes to Mecca will immediately realize that a piece of cloth,

by whatever name it is called, to cover his head and face from the heat, the dryness and the dust, is most useful. Nowadays, the turbans, distinguished by their designs and the way they are tied or worn, symbolize the nationality of the persons wearing them, eg whether they are Saudis, Sudanese, Afghans, Omanis, etc. The turban has become part of the national dress of those countries.

**[26]** In Malaysia, until 1960's, the turban worn the way the appellants wear them, were only worn by 'Hajis', men who had performed the Hajj (pilgrimage). There were few 'Hajis' then, one or two in a village. Of course the wearing of turban carried with it a social status, a sign of 'alim' (knowledgeable in matters of Islamic religion) and 'warak' (piety). Non-Hajis would not wear them. They would be ashamed to do so.

**[27]** Then came 1970's and the appearance of 'dakwah' (missionary) groups. They distinguished themselves by their dress, the men and their male children wore 'jubah' and 'serban'. One such organization had been declared unlawful. We saw their top leaders confessing, crying and repenting over television!

**[28]** It is interesting to note that, even now, very few of our Muftis and hardly any Shari'ah Court judge wears turban.

**[29]** Coming now to boys of the age of the appellants. According to Shari'ah (and/or fiqh), the obligation to perform even a mandatory ('wajib') practice like the five daily prayers, is only mandatory on Muslims who have attained the age of majority ('baligh'), usually taken to be 15 years of age for boys. Clearly, the appellants have not. Of course, it is obligatory on the parent or guardian to teach them how to perform the prayers, for example, and to encourage them to perform them even before they reach the age of majority. So, even with regard to practices that are mandatory ('wajib'), the Shari'ah treats adults and children differently, like any law, for that matter.

**[30]** The best place to see whether it is the practice of boys, I am speaking about Arab and Arabic-speaking boys (not Malay boys living in a FELDA settlement), of the age of the appellants to wear turban or not, is to go to Masjid Al-Haram, the birthplace of the Prophet (PBUH), where the 'House of Allah' ('Baitullah' or the 'Kaabah') stands. Go there after the 'Asar' prayer. One can see scores of boys of the age of the appellants sitting cross-legged learning to read and reciting the Al-Quran. None of them wears turban, whether tied the way the appellants do or otherwise.

**[31]** (I must admit that these observations that I have made do not come from evidence adduced in court. However, sitting in the highest court in the country and interpreting the Constitution, I hold the view that a judge is entitled to look around and observe the happenings in the society. These are matters that one sees in everyday life. No expertise or technical qualification is required to observe such happenings. Neither should judges not read anything other than law. I do not think that judges should keep their eyes shut and only wait for 'expert witnesses' to inform them such

things as the kind of dress Malaysians usually wear or that we can hardly find bullock carts on Malaysian road nowadays. 'Justice is blind'. Yes. But not judges. They should not be).

**[32]** As far as I can ascertain, the Al-Quran makes no mention about the wearing of turban. Neither SP3 nor the learned trial judge who cited some verses from the Al-Quran which, with respect, are not relevant to the issue, could produce any. The one 'hadith' referred to by SP3 makes no mention of its classification in terms of authoritativeness. In any event one does not look at one 'hadith' in isolation to make a ruling on a matter. Even then, the way it is said, (based on the evidence given by SP3: 'Hadith: hendaklah kelian memakai serban kerana kelian akan bertambah sabar') shows that there is a reason for it. As far as the reason given, I shall not comment. Certainly, the Prophet (PBUH) knows his people better and what suits them. The other 'hadith' mentioned by SP3 only tells us how the Prophet (PBUH) used to wear his turban, nothing more. Of course, I am also aware of other 'hadiths', not mentioned by SP3 or the learned trial Judge, that prohibit the wearing of turban by men when in 'ihram'. They do not assist us.

**[33]** It is also not disputed that there had been no 'fatwa' in this country on the wearing of turban.

**[34]** I accept that the Prophet (PBUH) wore turban. But he also rode a camel, built his house and mosque with clay walls and roof of leaves of date palms and brushed his teeth with the twig of a plant. Does that make the riding a camel a more pious deed than travelling in an aeroplane? Is it preferable to build houses and mosques using the same materials used by the Prophet (PBUH) and the same architecture adopted by him during his time? In Malaysia, Muslim houses and mosques would leak when it rains! There would be no Blue Mosque or Taj Mahal, not even the present Masjid Al-Haram and Masjid Al-Nabawi, Alhambra or Putrajaya that the Muslims can be proud of! Again, is it more Islamic to brush one's teeth with a twig than using a modern tooth brush with tooth paste and water to wash in the privacy of one's bathroom?

**[35]** It is not everything that the Prophet (P.B.U.H.) did or the way he did it that is legally (according to Shariah) or religiously binding on Muslims or even preferable and should be followed.

**[36]** I find the book 'Principles of Islamic Jurisprudence' by Mohammad Hashim Kamali (1991) to be very useful in understanding the issue on 'Sunnah'. I shall only quote certain parts that are of particular relevance to the issue under discussion:

> The entire bulk of the Sunnah, that is, the sayings, acts and tacit enactments of the Prophet, may be once again divided into two types: non-legal and legal Sunnah.
>
> Non-legal Sunnah (Sunnah ghayr tashri'iyyah) mainly consists of the natural activities of the Prophet (al-af'al al'jibilliyyah) such as the manner in which he ate, slept, dressed, and such other activities as do not seek to constitute a part of the Shari'ah. Activities of this nature are not of primary importance to the Prophetic mission and therefore do not constitute legal norms. According to the majority of ulema, the Prophet's preferences in these areas, such as

his favourite colours, or the fact that he slept on his right side in the first place, etc., only indicate the permissibility (ibahah) of the acts in question.

…

On a similar note, Sunnah which partakes in specialized or technical knowledge, such as medicine, commerce and agriculture, is once again held to be peripheral to the main function of the Prophetic mission and is therefore not a part of the Shari'ah. As for acts and sayings of the Prophet that related to particular circumstances such as the strategy of war, including such devices that misled the enemy forces, timing of attack, siege or withdrawal, these too are considered to be situational and not a part of the Shari'ah.

…

Certain activities of the Prophet may fall in between the two categories of legal and non-legal Sunnah as they combine the attributes of both. Thus it may be difficult to determine whether an act was strictly personal or was intended to set an example for others to follow. It is also known that at times the Prophet acted in a certain way which was in accord with the then prevailing custom of the community. For instance, the Prophet kept his beard at a certain length and trimmed his moustache. The majority of ulema have viewed this not as a mere observance of the familiar usage at the time but as an example for the believers to follow. Others have held the opposite view by saying that it was a part of the social practice of the Arabs which was designed to prevent resemblance to the Jews and some non-Arabs who used to shave the beard and grow the moustache. Such practices were, in other words, a part of the current usage and basically optional. Similarly, it is known that the Prophet used to go to the 'id prayers (salat al-'id) by one route and return from the mosque by a different route, and that the Prophet at times performed the hajj pilgrimage while riding a camel. The Shafi'i jurists are inclined to prefer the commendable (mandub) in such acts to mere permissibility whereas the Hanafis consider them as merely permissible, or mubah.

**[37]** SP3 gave his opinion that the wearing of turban is 'sunat'. Clearly, he based his opinion on the views of the traditional jurists — the turban wearing scholars from turban-wearing communities who lived at a time when the wearing of turban was customary or fashionable. Certainly their surroundings could have, to a certain extent, influenced their views on a matter such as the wearing of turban where Al-Quran is silent. That is natural. Imam Shafie revised some of his rulings after living in Egypt for a few years and observing the custom of the people there. That is the mark of a great jurist!

**[38]** Even if we were to accept the view of SP3 that the wearing of turban (by adult Muslim male) is 'sunat' or (commendable), it certainly does not rank on the same level as 'sunat prayers', as learned counsel for the appellants tried to convince the court when the question was put to him by me.

**[39]** So, the 'practice' is of little significance from the point of view of the religion of Islam, what more, in relation to underaged boys. Certainly, it is not a part of 'Islamic prophetic teaching' as submitted by the learned counsel for the appellants.

**[40]** Moving to the second factor which, in my view, should be considered i.e. the extent of the 'prohibition'.

**A** **[41]** We are not dealing with a total prohibition of wearing of the turban. The students, primary school students of the school, are not allowed to wear the turban as part of the school uniform, i.e. during the school hours. They are not prevented from wearing the turban at other times. Even in school, certainly, they would not be prevented from wearing the turban when they perform, say, their **B** 'Zohor' prayer in the school 'surau' (prayer room). But, if they join the 'Boy Scout', it is only natural if they are required to wear the Scouts uniform during its activities. Or, when they play football, naturally they would be required to wear shorts and T-shirts. Should they be allowed to wear 'jubah' when playing football because it was the practice of the Prophet (PBUH) to wear jubah? Following the arguments or **C** learned counsel for the appellants, they should. Certainly, there is a place for everything.

**[42]** Furthermore, there is nothing to prevent them from changing school, eg to a 'pondok' school that would allow them to wear the turban.

**D**

**[43]** To accept the learned counsel's argument would mean that anybody has a right to do anything, any time, anywhere which he considers to be a practice of his religion, no matter how trivial. The only limit is clause (5). To me, that cannot be the law.

**E**

**[44]** Coming now to the third factor that in my view, should be considered i.e. the circumstances under which the 'prohibition' was made.

**[45]** Whether we like it or not, we have to accept that Malaysia is not the same as **F** a Malay State prior to the coming of the British. She is multi-racial, multi-cultural, multi-lingual and multi-religious. It is difficult enough to keep the 14 States together. By any standard, Malaysia's success has been miraculous in terms of unity, peace and prosperity. Whatever other factors that had contributed to it, we cannot ignore the educational system that had helped to mould the minds of Malaysian boys and girls to grow up as Malaysians. Recently, we heard about 'polarization' of students at **G** universities not only on racial and religious grounds but also among the Muslim students themselves. The polarization was considered serious and even a dangerous trend. Hence, national service was introduced. Of course, such polarization do not begin the moment the students step into the campus. The seeds were sown and grew while they were in school. Our educationists, with their experience in dealing with **H** students on the ground, should be given some respect and credit when they formulate some regulations applicable in their schools for the general good of all the students, the society and later the nation.

**[46]** Look at these three appellants. During their formative years, when they should **I** be attending school, study and play with other students, obey the school discipline, respect their teachers, they were made to spend those years being different from other students, disregard the school regulations, disobey the teachers, rebel against the authorities, just because Syed Ahmad, described by the learned trial Judge as 'angkuh' wanted the three appellants to wear the turban to school because the turban is his family's emblem!

**[47]** Considering all these factors, in my judgment, the School Regulations 1997 in so far as it prohibits the students from wearing turban as part of the school uniform during school hours does not contravene the provision of art 11(1) of the Federal Constitution and therefore is not unconstitutional.

**[48]** I would dismiss the appeal with costs here and in the courts below and order that the deposit be paid to the respondents to account of taxed costs.

**[49]** Both the learned President of the Court of Appeal and the learned Chief Judge (Sabah & Sarawak) had read this judgment in draft and agreed with it. The court orders accordingly.

*Appeal dismissed.*

Reported by Loo Lai Mee